

COMPARING THE IMPLEMENTATION OF RESTORATIVE JUSTICE IN VARIOUS COUNTRIES: PURPOSE, POTENTIAL AND CAVEATS

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Abstract

The aim of this contribution is to deal with the purposes, benefits and caveats of comparative studies in the field of restorative justice. This consideration is of first importance since more and more international conferences, seminars or 'fora' are dealing with the issue of comparison². The paper will examine the structural conditions for the increasing interest in comparative approach, especially in Europe; highlight the relevance of undertaking comparative studies in the field of restorative justice; point to the main difficulties in developing comparative evaluative research; present two important methodological positions in developing comparisons between different countries' development; and the conclusion will elaborate upon potential and caveats of both methods and suggest a framework of implementation for comparative studies in the field of restorative justice.

Key Words: Restorative justice, comparative studies, evaluation, European trends, intensive comparison, Denmark.

Introduction

The aim of this contribution is to deal with the purpose, benefits and caveats of comparative studies in the field of restorative justice. This reflection is of first importance since more and more international conferences; seminars or 'fora' are dealing with the issue of comparison². In the recent work of the European Concerted Research Action "Restorative Justice Developments in Europe" funded by the EU Commission, the comparative approach is at the forefront: this Action tries "to enhance and to deepen knowledge on theoretical and practical aspects of restorative justice in Europe, with the view to supporting implementation strategies in a scientifically sound way".

This article found its inspiration in the work performed in the framework of this Action, in particular in the work of the working group analysing and developing upon existing evaluative research on restorative justice, as well as in previous research experiences in comparative studies (Lemonne, 2000, Lemonne 2001a; Lemonne; 2001b; Lemonne, 2003; Lemonne and Vanfraechem, 2005). It provides a good opportunity to build on the debate concerning the purpose, potential and difficulties of dealing with comparisons in the field of restorative justice. The first section will examine structural conditions for the increasing interest for the comparative approach, especially in Europe. A second section will highlight the relevance of performing comparative studies in the field of restorative justice. A third section will point to the main difficulties in developing comparative evaluative research³. A fourth section will present two important methodological positions in conducting comparisons between different countries' development. Finally, the conclusion will elaborate upon potentials and caveats of both methods and suggest a framework for comparative studies in the field of restorative justice.

Current Trends in European Societies and Development of Comparative Studies in the Field of Restorative Justice

Though crossing boundaries in scientific research has always had a "universal appeal" (Pakes, 2004:13), the reasons to compare can be various and "cannot always be specified from the outset" (Nelken, 1994). However, it is possible to point to some current trends in the European society, which give more weight to the increasing importance and relevance of a comparative approach to the criminal justice system in general and of restorative justice in particular.

Primarily, the slow emergence of a European 'community' leads to the identification of similar challenges in different criminal justice systems. Indeed, changes in some political systems and national boundaries (as for example the enormous changes in the ex-Soviet bloc, the general political trend towards neo-liberalism, the tensions existing between Western countries and those in the Middle East) lead to the production of new forms of social order and social control arrangements, especially in Western countries⁴. In this context, discussion within a large community of scholars concerning 'how best to describe and understand conflict and social control' has taken place. For some European scholars, this evolution has given rise to dissatisfaction with the current criminal justice systems and to the search for new approaches, including restorative justice. Researchers were rapidly interested in investigating how other systems developed new initiatives in this matter.

Also the interest for comparative research in the field of restorative justice has been stimulated by another consequence of this phenomenon of 'europeanisation', itself imbedded in the larger process of 'globalisation': the increasing mobility for workers, including researchers, who more than ever exchange knowledge about the evolution of national criminal justice systems through funding allocated by the European Commission.

At the same time, information about other countries' practices becomes more available and accessible through technological progress.

Despite the early developmental stage in which the European restorative justice field finds itself, many information channels have already been put in place due to the aforementioned structural conditions. The European Forum for Restorative Justice is a good illustration. It allows for regular contacts between practitioners, governmental organizations and social scientists through different channels of communication including meetings, contact points, websites, 'chat' rooms, etc⁵.

Undoubtedly, the financial support provided by European institutions in order to develop comparative research is also closely linked to the tendency for criminal justice systems to be less 'Nation State' based than they were before. The growing number of international treaties, including European legislation and rulings, which aim uniformly and transnationally (i.e. across national legislations and different policing organisations) to deal with the consequences of crime or conflicts, bears witness to such an evolution. If harmonisation of laws, procedures and standards for the development of criminal justice programmes is seen, in this context, to be beneficial to victims, offenders and local communities, then knowledge of systems in neighbouring countries is also considered as vital in securing basic levels of cooperation between the States by policy makers.

In Europe, academics and researchers have been involved significantly in the design of international arrangements (see for example, the creation of the Recommendation N° R(99) 19 of the Committee of Ministers to Members States concerning Mediation in Penal Matters, or of the recent Framework decision of the 15th of March 2001 on the standing of victims in criminal proceedings). These participants were also eager to develop comparative studies, focusing on countries' distinctive features in order to understand the limits of implementation of international provision⁶. Debates regarding criminal justice are, thus, more often than before, enriched by information on the developments in other countries, which are crucial in securing and legitimising the supranational decision-making process. A recent publication of the Home Office illustrates this latter trend, be it from a "national" point of view:

The aim of the original review was to provide an overview position and use of restorative justice in jurisdictions other than England and Wales in order to inform development of Home Office Policy (Miers and Willemsen, 2004)⁷.

In our own comparative study on the development of restorative justice in Denmark and Belgium, we noticed that strategies developed in neighbouring European countries were carefully and extensively considered by politicians before taking any decisions concerning the implementation of innovative strategies (Lemonne, 2000).

Potential Benefits of Comparative Studies in the field of Restorative Justice

If these 'structural' incentives for comparative studies involve a mixture of scientific and political aims, they clearly increase the possibility for researchers to build critical knowledge and valuable strategies related to restorative justice. Indeed, there is no doubt that comparative studies in this field can provide theoretical insights for law, social anthropology, criminology, sociology as well as for the development of restorative justice itself. Firstly, a broader understanding of restorative justice can be gained if sufficient documentation is gathered and analyses and conceptualization of restorative justice processes and applications are performed. Secondly, the discovery of policy differences may help to overcome ethnocentrism referring to the unquestioned common sense that domestic arrangements are either 'necessary' or 'normal'. Comparative studies provide an opportunity to gain insight into other systems and, maybe, more importantly, into those of one's own country:

Immersion in one's own criminal justice system tends, inevitably, to solidify assumption and to blur critical faculties. Laws can appear 'natural', modes of implementation 'inevitable' and relationships between criminal justice agencies 'necessary' (Pakes, 2004: 14).

But, as Garland (2001) argues, it does not necessarily have to be that way. In developing an appropriate comparative methodology in the field of restorative justice, one can contribute to the theoretical developments of the restorative justice field, as it will require a questioning of how to understand the "other" without using stereotypes or denying difference. Thus the development of a comparative approach can lead to healthy debates between restorative justice scholars from various countries, helping the actors on the field to optimally reflect upon their vision and interpretation of problems, questioning approaches which are inspired and influenced by their own culture.

Comparative Studies in the Field of Restorative Justice: Three Main Difficulties

As we have shown, there are many good reasons for developing comparative studies in the field of restorative justice. However, we have to take into account three main methodological difficulties that occur when comparing distinctive criminal justice systems of various countries: the varying reliability of criminal statistics; the lack of shared concepts; and, often, a lack of a theoretical and/or methodological common ground among scholars participating in the comparative research. The European restorative justice field is no exception and has to deal with these difficulties: there is an important deficiency in reliable databases and in shared concepts, a phenomenon intensified by the fact that restorative justice is still an evolving concept. Restorative justice programs are often in early phases of development, and often lacking, even within a country, reliable and comparable statistical data and shared concepts between programmes.

Any effective comparison requires intimate knowledge about the acquisition of the data itself. Currently, the interpretation of statistical data at an international level is far from being without risk. A meta-analysis of existing evaluative research available in various countries was presented at a meeting of the framework of the European Concerted Research Action⁸. It showed the following were needed in the European restorative justice field in order to be able to compare the available data:

- (i) a systematisation of data collection (data are often partially unavailable and not collected according to the same criteria);
- (ii) a good knowledge of the research method and theoretical framework used in these evaluations (in the field of restorative justice, evaluative research is undertaken through both action-research and more conventional evaluative methodologies; some use positivist methodologies and some use more critical approaches; certain pieces of evaluation deal with many issues, whilst others focus on more specific topics, ranging from the focussed analysis of a mediation process to the impact of restorative justice on recidivism.);
- (iii) clarification of the terminology used in describing the programs under analysis (there is variation about what restorative justice means and whether the programmes to be evaluated are restorative);
- (iv) a more profound analysis of the social, political and ideological backgrounds supporting the development of restorative justice, thus enabling understanding of the form and function of restorative justice discourses and practices with respect to broader trends in the criminal justice systems and in society as a whole.

These caveats can only be overcome if intensive qualitative studies are performed. Unfortunately, there has been a tendency in this field to underestimate the value of a thorough understanding of the system and of the society that produced it in order to understand the form and the function of restorative justice. A simple comparison of restorative justice statistics, isolated from their specific social context as well as from the developments in the wider criminal justice, is not particularly informative. For instance, for optimal comparison of one nation's tendency to use restorative justice as a means of social control, more information is required than the mere number of restorative justice cases dealt with by the system. The comparison should include information about political issues and debates in general and about criminal matters in particular, about the role and position taken by, and influence of, researchers, policy makers and others with respect to the development of criminal policy as well as about their political, theoretical and methodological orientations. Information on crime figures, prison figures, relative wealth of countries, distribution of wealth in society, and unemployment rates might also be relevant in understanding particular restorative justice interpretations.

How Best to Deal with Comparative Research in the field of Restorative Justice: Two Main Methodological Approaches

According to Pakes, there are two main methodological approaches in comparative studies: the “positivist approach” and the “relativist approach” (Pakes, 2004:13). Positivist comparative research consists of the identification of a “core set of principles” underlying restorative justice and the philosophy underlying this approach is that restorative justice programs in various countries can be best understood by focusing on the ‘commonalities’ they share. The assumption is that, at a certain level, ‘justice’ is a universal concept. Social control is a phenomenon that occurs in any given society; so consequently, restorative justice may be understood in general terms. In the positivist approach, there is often a large number of countries being compared. Such projects tend to be more practical and inspired by issues such as the development of normative standards or general conclusions about the efficiency and efficacy of the programme. In these research projects non-indigenous arrangements are often explained in relation to indigenous arrangements.

By contrast, the main aim of the second approach, the relativist approach, is to understand human behaviour and social control applications in the context of history, culture and social organisation. Such research represents a relativist philosophy: the way societies are organised does not correspond to certain templates or principles but is rather a function of the environment, history and culture. It tends to illuminate dissimilarities and sharpen contrasts. The programmes in place are, therefore, assumed to depend on these variables (habits, culture and history). Consequently, it is not advocated that, because one society works in a particular way, others work or should work in the same fashion. After having learned how societies are organised abroad, one can look to one’s own society with a new perspective and realize that the way society is organised is not necessarily the best possible way, and certainly not cast in stone. This approach, also named by Nelken (1994) the ‘interpretivist method’, is defined as an approach aiming to show how crime and criminal justice are embedded within changing local and international, historical and cultural contexts. Indeed, as Fairchild and Dammer put it

the fact is that a nation’s way of administering justice often reflects deep-seated cultural, religious, economic, political, and historical realities. Learning about the reasons for these different practices can give us insight into the values, traditions, and cultures of other systems (Fairchild and Dammer, 2001:9).

Thus, relativist comparative research will aim to identify the way a country’s type of social control, including restorative justice policy and practices, resonates with other aspect of its culture⁹. Indeed, many statements about restorative justice, as about other criminal justice models, which claim to be universal, certainly take in reality, “meaning and limit of applicability from cultural connections” (Nelken, 1994).

In other words, in the field of restorative justice, such studies could examine and understand how policies and programs have come to be and why they seem to work in the way they do. They will be focused on the social construction of restorative justice and will help to clarify the meaning of the concepts in different countries. Matter of fact, discourses and practices about restorative justice often appear to be peculiar after close examination:

Among the more salutary discoveries of recent comparative research is that terms and institutions that at first blush look strikingly similar (indeed often consciously adopted and adapted from an imported model) turn out on closer examination to be distinct in interesting and meaningful ways (Sparks and Newburn, 2004: 7).

Their meaning and implementation often reveal stronger differences than at first glance. Hence, one needs to look at the nature of particular socio-economic, cultural and political contexts. Such studies will necessarily rely on fieldwork and would require the researcher to spend a considerable amount of time in the country of interest (Hodgson, 2000). The study we conducted on restorative justice developments in Denmark and Belgium illustrates quite well the benefits of a long period of immersion in a foreign country:

Firstly, research results clearly exemplify that the same concepts can cover very different meanings, according to their country of implementation. Indeed, although the so-called Danish ‘konfliktråd’ (‘council of conflict’ where victim and offender meet with a neutral mediator in the local environment) found their origin in the Norwegian mediation institution of the same name, the initial objectives of both programmes appeared to be quite different. In Norway, ‘konfliktråd’ are well known to have been essentially envisioned as an alternative to the traditional justice system while, in Denmark, they have only been considered as a supplement to the criminal justice system and this, despite attempts to introduce them as an alternative. In consequence, by contrast to the Norwegian programme and despite first assumptions, Danish ‘konfliktråd’ never really aimed to compete or contradict the traditional criminal justice system¹⁰.

Secondly, through the thorough study of the Danish ‘konfliktråd’, more could be learned about the specific incentives allowing a larger development of restorative justice practices in Belgium. The comparison between the processes of implementation of the policies of both countries highlighted the importance of the specific involvement of academics in the development of restorative justice in each country. This conclusion exemplifies the statement that immersion in another criminal justice system tends to help achieve better understanding of specificities of one’s own system.

Thirdly, looking abroad can broaden the possibilities for alternative arrangements. The study of the Danish and Belgian restorative justice programmes showed that depending on the implementation of specific procedures, restorative justice programmes, although set up as a supplement to the criminal justice system, could also make a deeper impact on the traditional criminal justice system.

Finally, participation in 'day-to-day' life, including the learning of the language, facilitates the access to 'first hand' scientific literature, media or meetings which help to better understand the broader debates taking place in a society, without over-interpreting meanings according to one's own cultural perspective. For a long period, the Scandinavian criminal justice policy was presented as 'lenient', 'humane' and 'rational' but immersion helped to perceive the strong socio-political changes taking place in Denmark. These changes partly allowed better understanding of the form and the function taken by 'konfliktråd' and their potential impact on Danish criminal policy. Indeed in Denmark, despite the expectations of some of the restorative justice proponents, the term restorative justice was never used in political discourse. In addition, it seemed that a more pragmatic and less structured ideology simultaneously emerged in the Danish criminal policy. After a period of de-emphasizing the use of punishment (de-penalisation in sentencing, liberalisation in correction and search for alternative to imprisonment) the debate about violence brought, in parallel to the implementation of the 'konfliktråd', several other initiatives such as, fast handling of violent cases by the court, experimental treatment of violent behaviour in prison, youth contracts, efforts against street gangs, rapid intervention against children and juveniles who commit crime, more places in secure units and long term courses of treatment (Lemonne, 2001a; Balvig, 2004; Greve, 2005).

Conclusion

A fundamental question, according to Nelken (1994), is to define and delimit the goal of comparison in order to develop appropriate methods. He identifies some important questions that need to be taken into account when doing comparative research and which, we believe, can be applied in the comparative study of restorative justice: Should we be looking at similarities or differences? Should we provide for explanation or understanding? Can the one be separated from the other? And how far can these different strategies of comparison be combined?

There is no doubt that there is a lot to be gained in comparing the implementation of restorative justice in various countries. However, there are also considerable difficulties and uncertainties about how best to conduct it. Is the task of comparative research in this field to establish a "culture free" model of restorative justice? Is it even possible to establish such a model? The positivist approach involves a risk of underachievement because of the search for universal theories of restorative justice and the effort to compare too many countries over too many features. We believe that more progress could be made through more modest but more focused efforts to investigate specific examples of restorative justice applications in two or three countries. Indeed, "with too many widely different countries and cultures, only general questions are possible" (Nelken, 1994). It is surely part of the task of comparative research on restorative justice to seek to establish to what extent programmes in different countries are, in fact, comparable. As emphasised by Nelken (1994), if positivist methodologies are not ideal for this task, interpretivist approaches may provide better results. The use of more interpretative approaches, including more individual or collaborative immersion in different countries' realities,

would also decrease some other dangers afflicting comparative research: the risk (as an outsider) of asking inappropriate questions about a system that is not well known or understood; and the risk (as an insider) of failing to appreciate what is the most specific or outstanding about one's own system. However, this method is not free of hazards either. To focus on two or three countries implies "the risk of assuming that these countries represent polar opposites or at least, the full range of possible contrasts in a given phenomenon when they are only two points in a continuum".

In consequence, I will conclude, following Nelken (1994), that it is worth interlinking intensive and extensive comparisons (the first being often neglected in comparative research). On the one hand, it means that close comparison of a limited number of countries must be placed within a clear framework, which is in principle open to a wider application. It involves developing concepts that are suited for particular countries being compared, but at the same time capable of a wider application. On the other hand, it implies considering social and cultural factors as a means of explaining differences in practices and as symptoms of the culture of the countries under consideration.

End Notes

1. The author has some experience in comparative studies, first as a Belgian researcher used to dealing with rules, regulations and policies varying between Communities in a Federal State, and secondly, through a work performed on the implementation of restorative justice in Belgium and Denmark.
2. See for example, The European Forum For Victim-Offender Mediation And Restorative Justice (ed.), *Victim-Offender Mediation in Europe. Making Restorative Justice Work*, Leuven University Press, 2000.
3. Being either presented under the form of a common evaluation framework applied to various countries or under the form of a comparison between nationally based evaluative research projects performed by various researchers with different analytical frameworks.
4. See, for example, in Europe Fellegi, Borbala (2005). *Meeting the Challenges of Introducing Victim-Offender Mediation in Central and Eastern Europe Final Report of the AGIS Project*, Leuven, Belgium: European Forum for Victim-Offender Mediation and Restorative Justice. v.z.w. This report summarises the results of the AGIS project on meeting challenges of introducing victim-offender mediation in Central and Eastern Europe that the European Forum for Victim-Offender Mediation and Restorative Justice coordinated between December 2003 and November 2005 with the financial support of the EU Commission.
5. This is the merit of the European Forum for Restorative Justice which led, amongst others things, to the elaboration of the large Research Concerted Action program on 'Restorative development in Europe' financed by the EU Commission. This included several objectives: (1) to develop evaluative research, (2) to increase knowledge about policy developments and (3) to improve European theoretical research in the field of restorative justice.
6. This was the case, for example, in the creation of the European "Recommendation No R (99) 19, Mediation in Penal Matters". This recommendation led to a wider acceptance, adoption and implementation of VOM in Europe. See Aertsen, I, Mackay, R., Pelikan, C., Willemsens, J. and Wright, M. (2004) ; Pelikan, C., (2003). See also Aertsen I. and Peters T. (2003).
7. See Miers, D. and Willemsens, J. (ed.), (2004.). There are also several publications that focus on "the state of affairs concerning restorative justice in my country". They are not truly

comparative but their aim is to facilitate understanding and comparison. They can therefore be envisioned as work of a comparative nature.

8. Meeting held in Lisbon in September 2003.
9. 'Culture' is here understood not as a factor or variable to be added into an explanatory equation but more as the name for the context in which such causes operate and which supplies them with their meaning. (See Nelken, 2004: 223)
10. It is worth noting this only concerns the analysis of 'ideology'. When practical implementation is considered, analysis shows that the Norwegian 'konfliktråd', despite the opportunity offered by the law on mediation, is essentially a means of diversion for cases that would otherwise not have been dealt with by the penal justice system. In some way, it can be argued that the Norwegian system 'practically' also leaves intact the main core of the penal justice system.

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